United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1100

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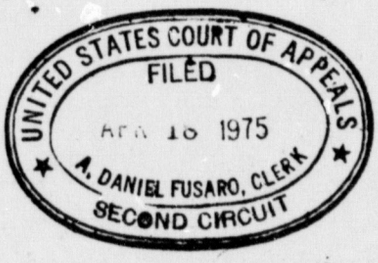
To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- STEVEN POND and DAVID G. FANELLI, Appellants.	Docket No. 75-1100

BRIEF FOR APPELLANT
STEVEN POND

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the affidavit in support of a search warrant included a misrepresentation which was both intentional and material, requiring a finding that the search warrant was invalid and that the evidence should have been suppressed.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lawrence W. Pierce) rendered on February 27, 1975, convicting appellant Steven Pond, after a plea of guilty, of conspiracy to distribute marijuana (21 U.S.C. §§841(a)(1), 841(b)(1)(B)), and sentencing him as a young adult offender (18 U.S.C. §5010(d)) to two years' imprisonment. Pond remains released on bail pending appeal.

The District Court granted leave to appeal in forma pauperis, and this Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On December 5, 1973, George Sweikert, a Drug Enforcement Administration agent in New York City, prepared an affidavit for a warrant to search a footlocker and a suitcase. The affidavit, annexed as pages 18-19 at "B" of appellant's separate appendix, asserts that a white male named Bill [sic] Pond* (¶3)

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*Pond's physical description and apparel are included in ¶4 of the affidavit.

checked (¶3) a suitcase (50 pounds) and a footlocker (35 pounds) (¶2) at an Amtrak station in San Diego, California (¶3) and boarded an Amtrak train to New York City (¶1). The affidavit stated the numbers of the baggage receipts (¶5). The critical paragraphs of the affidavit stated:

> 6. That said source of this information has proven himself reliable in the past based upon approximately 40 cases leading to over 70 arrests and an aggregate recovery of marijuana in excess of 2000 pounds. That said source relies among other things, on an acute sense of smell which has been invariably accurate in the past detection of marijuana in similar circumstances as those present. That he detected marijuana under similar circumstances about five weeks ago, and that among his many instances of detection there was one seizure of over 120 pounds of marijuana in Penn Station, N.Y.C. within the past year that was contained in a footlocker and a suitcase under similar conditions as those here.
>
> 7. That the source is certain he has detected the aroma of marijuana emanating from the aforementioned baggage and that based on his past experience, skills and the indicators developed such as a disproportionate ratio of baggage weight to size, he has concluded that a large amount of marijuana is being transported on said train.
>
> Appendix "B" at 19.

As noted in the affidavit, the information was given to Agent Sweikert by Agent Ed McCravy of the Drug Enforcement Administration office in San Diego, California (151*). McCravy's information was, in turn, based on information given him by an unnamed informant.

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*Numerical references in parentheses are to pages of the transcript of the hearing below.

Based on the warrant, Sweikert and others went to Penn Station and established surveillance on the upper and lower levels (113). Agents posing as baggage handlers in the baggage claim area executed the search warrant before the baggage was claimed (120). They opened the footlocker and observed its contents (121, 152-153).

The baggage was claimed (116) by appellant (117), who was arrested after he left the station (117), and, with Fanelli, was taken with the baggage to the Drug Enforcement Administration offices where the footlocker was opened. The bricks of marijuana found inside were wrapped in red paper covered with plastic, although the plastic did not cover the entire brick in some instances (160). The bricks were then wrapped in two garbage bags covered with talcum powder.

Counsel for appellant Pond made a motion to suppress evidence seized pursuant to the warrant issued on the strength of the affidavit, claiming there was no probable cause to believe that the baggage contained marijuana, and a hearing was held.

Based on the testimony given at the hearing, Judge Pierce found that the statements in the affidavit that the footlocker and the suitcase were of a weight which was unusually and disproportionately heavy were false and that such information was not given to Agent Sweikert by Agent McCravy (24, 130). He concluded, however, that the misrepresentation was not intentional, and thus by itself did not invalidate the warrant and consequent seizure. The judge therefore proceeded to determine whether the allegations of smell alone created probable cause.

The testimony thus centered about the assertion in the affidavit

that the unnamed informant had smelled marijuana.

At the hearing, Agent Sweikert testified that Agent McCravy had told him that Donald Dunbar, the informer, had participated in 40 cases resulting in 70 arrests and seizure of some 2,000 pounds of marijuana (48). Sweikert said McCravy told him that Dunbar smelled a marijuana odor coming from luggage in many cases (48), but had mentioned only one other specific instance of the use of the sense of smell (52, 53), an event occurring five weeks before issuance of the warrant in this case, involving marijuana coming into Penn Station in "just about" the same circumstances (49, 50). However, Sweikert said that McCravy believed Dunbar to have an expert sense of smell because Sweikert believed that Dunbar had helped McCravy by use of his sense of smell in the bulk of the 40 cases (55).

Agent McCravy testified to what Dunbar had told him. He testified that on December 4, 1973 (5) Donald Dunbar advised him by telephone that a Bill Pond had purchased a train ticket for New York and had checked two pieces of luggage (5) at the Amtrak station in San Diego, California, of which Dunbar was the manager. Dunbar gave McCravy the baggage claim ticket numbers, described Pond, and said that the checked baggage emitted an odor of marijuana (6, 10). McCravy testified that Dunbar had given correct information 35 or 40 times and that on many occasions he had reported luggage emitting an odor of marijuana (6).

The next day, December 5, McCravy relayed this information

to Sweikert (12) at the New York office of the Drug Enforcement Administration (10).

Later McCravy qualified his testimony concerning Dunbar's prior assistance,* saying Dunbar had assisted in only 25 or 30 cases (17, 100), that not all of those cases involved marijuana (100), and that Dunbar's sense of smell had been used in only about 50 per cent of the cases in which Dunbar had been involved (101). Despite allegations in the affidavit that Dunbar had helped in similar circumstances, McCravy at first could not recall the circumstances of any other of the cases (23, 30), including the one reported in the affidavit as having occurred five weeks earlier or the one involving seizure of marijuana at Penn Station (30, 89, 90).

During the course of McCravy's testimony, Judge Pierce recalled that the Penn Station case was United States v. Meinecke (94). Later McCravy testified that he had testified in the Meinecke case and, with assistance from the prosecutor, recalled he had also been a witness in United States v. Condrick (99). The Judge recalled that in Meinecke both Dunbar and the agent smelled marijuana (143-144). There was no testimony in the record as to

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*It was revealed at the hearing that Dunbar was the San Diego Amtrak station supervisor. However, since that fact was not before the magistrate issuing the warrant, it could not be, and was not, used by the District Court to evaluate credibility.

how the marijuana involved in Meinecke was wrapped.*

McCravy had no knowledge as to how Dunbar detected the telltale odor (24). McCravy testified that marijuana in brick form has a distinctive odor (26), and that this was true even if it was wrapped and sealed (27), although he conceded that the kind of wrapping would affect the degree of the odor (27).

The Government then called Drug Enforcement Administration Agent Keith G. Logan to testify to the smell of unwrapped marijuana and to the odor of that substance when it was wrapped (278, 282). However, Logan could not recall smelling marijuana wrapped in both paper and plastic (282).

Counsel asked to interrogate Dunbar, who was present in New York on the first day of the hearing, to challenge his ability to smell marijuana. Counsel also wanted specifically

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*In United States v. Meinecke, 73 Cr. 164 (S.D.N.Y., Pierce, J.), Dunbar noticed three extremely heavy suitcases with powder coming from their seams and smelled an odor. Dunbar called McCravy, who came to the Amtrak station, saw the white powder, and smelled the odor. In that case, Judge Pierce held:

> The Court finds that the observations as to weight, talcum powder and the odor of marijuana itself are sufficient to establish probabl[e] cause for the issuance of the warrant.
>
> The concentration of marijuana in the suitcases lends cred[e]nce to the conclusion that despite the wrapping and the airtight appearance of the suitcases trained agents could very well have detected the odor of marijuana and particularly if alerted by the presence of talcum powder and the weight of the suitcases.
>
> Id., Transcript at 85-86.

Meinecke was affirmed on appeal by this Court, but the issue of the ability to smell was not raised on the appeal (Docket No. 73-2736).

to test Dunbar's ability to smell marijuana in a simulation of the situation in this case: through red and brown paper, plastic, plastic garbage bags, and the specific piece of luggage involved (68). The Judge required a showing of falsehood or imposition on the magistrate, as required under United States v. Dunnings, 425 F.2d 836 (2d Cir. 1969), cert. denied, 397 U.S. 1002 (1970). Counsel explained that he could not make a showing because Dunbar would not talk to him. Nor, said counsel, could he have possession of marijuana in order to set up the test (71).

The Court refused to permit defense counsel to call Dunbar, saying that, under the cases, it was not necessary (72). Defense counsel argued that he had the right to ascertain Dunbar's ability to smell marijuana (74). Counsel argued that Dunbar's tips were premised on a combination of factors, including smell, and that to parlay his reliability based on multiple considerations into reliability based solely on a sense of smell was improper (132-133).

Judge Pierce also refused to permit cross-examination on the issue of the circumstances of Dunbar's smelling marijuana at the Amtrak station in San Diego. The Judge was satisfied that the informant had smelled marijuana on other occasions and had been shown to be reliable (185).

Judge Pierce then denied the motion to suppress the marijuana found in the footlocker and the suitcase. In his opinion*

*The opinion is "C" to appellant's separate appendix.

the Judge found a negligent misrepresentation as to the disproportionate weight, but concluded it was not material because smell alone can give probable cause to issue a search warrant; that, while the information as to smell was hearsay, there was a substantial basis for crediting the hearsay; that the substantial basis was the allegation that the informer had an acute sense of smell and had proved himself reliable under similar circumstances, including two specifically identified; and that the issue was not whether Dunbar could smell the marijuana, but whether the agent had correctly reported the basis for the informer's conclusion and reliability.

After the hearing, appellant pleaded guilty, specifically preserving for appeal the issues raised at the hearing.

ARGUMENT

THE SEARCH WARRANT WAS INVALID, AND THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

At the hearing on the motion to suppress, Judge Pierce found that the allegation of disproportionate weight was false. This finding was premised on the testimony of Agent McCravy that he had not relayed that information to Agent Sweikert. The Judge found, however, that the misrepresentation was not intentional, and therefore went on to determine materiality -- whether the warrant would have been issued without the misstatement. United States v. Gonzalez, 488 F.2d 833, 837-838 (2d Cir. 1973); United States v. Thomas, 489 F.2d 664 (5th Cir. 1973). Judge Pierce properly concluded that without the assertion that the unidentified informant could smell the marijuana in the footlocker, there was no probable cause to search. However, he erroneously found that this allegation was sufficient to justify issuance of the warrant and to sustain the finding of probable cause.

A. The misrepresentation was knowing, and therefore intentional.

On the facts of this record, the conclusion that Agent Sweikert's misrepresentation as to the disproportionate weight of the baggage was unintentional was incorrect. The misrep-

resentation was, on this record, done in such a manner as to require a finding that it was done knowingly and with intent.

The affidavit shows that Sweikert, based on the information given him, believed the footlocker and the suitcase weighed 35 and 50 pounds, respectively. Despite this usual and possible weight, as Judge Pierce found (213-214), Sweikert also reported in the affidavit that the weight was disproportionate. Further, Agent McCravy testified that he never told Sweikert that the weight of the footlocker and the suitcase was disproportionate to their size (34). Sweikert acknowledged that his notes on the telephone conversation with McCravy were sketchy and had certain omissions,* and that the notes contained no mention of disproportionate weight (61).

That Sweikert included in his affidavit the factor of disproportionate weight despite all this demonstrates that he acted in disregard of the information and circumstances known to him. He failed either carefully to appraise the information or to examine his affidavit before presenting it to the magistrate. This kind of intentional disregard of information, coupled with a failure to confirm his information with McCravy, must result in a finding of knowing failure to report the correct information and intent to do so. See United States v. Joly, 493 F.2d 672

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*The record shows that the notes made no mention of the assertion that Dunbar helped in the seizure of a total of 2,000 pounds of marijuana or that one case involved seizure of 120 pounds of marijuana at Penn Station (59-61).

(2d Cir. 1974); United States v. Olivares-Vega, 495 F.2d 827 (2d Cir.), cert. denied, 43 U.S.L.W. 3295 (1974).

B. The misrepresentation was material because the allegations of smell were inadequate to establish probable cause.

Since the information contained in the affidavit presented to the magistrate was either hearsay* or double hearsay** (see United States v. Wilson, 479 F.2d 936, 940 (7th Cir. 1973); United States v. Fiorella, 468 F.2d 688, 691 (2d Cir. 1972)), it was necessary to show not only the general reliability of the informant, but also the underlying circumstances necessary to enable the magistrate independently to judge the validity of the informant's implied conclusion that there was marijuana in the footlocker. Alternatively, Sweikert should have provided independent corroboration of the information given to show the validity of the information. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). However, the "substantial basis" for crediting the hearsay (United States v. Harris, 403 U.S. 573, 581 (1971)) was not present.

Nowhere in the affidavit is it explained how or why the informant got his information. Although it is asserted that he had given information in the past, the affidavit does not

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*From McCravy to Sweikert.

**From Dunbar to McCravy to Sweikert.

advise how the information in this case or the others was collected, nor, aside from his connection with the baggage, is there a description of any kind of criminal activity on the part of appellant. Spinelli v. United States, supra, 393 U.S. at 417; United States v. Dunnings, 425 F.2d 836, 839 (2d Cir. 1969), cert. denied, 397 U.S. 1002 (1970). Further, the affidavit mentions no corroboration from other sources or any information known to the police which would provide a basis for believing that appellant was involved in marijuana transport or sales (United States v. Harris, supra, 403 U.S. at 573).*

The corroboration required for a tip premised solely on smell, under Johnson v. United States, 333 U.S. 10 (1948), is that the magistrate find the affiant qualified to know odor and that the odor is one sufficiently distinctive to identify a forbidden substance. Here, the affidavit on its face was devoid of any allegation that marijuana has a distinctive odor. Further, here the affiant was not the smeller. Sweikert asserted conclusively that Dunbar, the person who made the smell test, had an acute sense of smell and could smell marijuana. But the affidavit states only that Dunbar's sense of smell, when combined with other observations, had invariably produced success in detection of marijuana. Even the specific reference to events which had taken place five weeks earlier under similar circum-

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*Disclosures at the hearing that the informant was an Amtrak station supervisor do not help to compensate for the deficiencies in the information before the magistrate.

stances was to a case involving both smell and weight. Since the information relating to weight cannot be considered, the magistrate was not accurately advised of the basis for the informer's conclusion or for the reason for the agent's belief it was valid, and Judge Pierce was incorrect when he concluded to the contrary.

At the hearing, it was disclosed that Dunbar's sense of smell had been involved in a lesser number of cases than had been represented to the magistrate in the affidavit and that, despite the affidavit, the Government could establish none with the critical similar circumstances -- that is, odor alone when the marijuana was similarly wrapped. The evidence showed that the bricks seized in this case were wrapped in paper, that most had a second layer of plastic, and that all were wrapped in plastic garbage bags. Then all the bricks were placed in a footlocker and covered with talcum powder to camouflage the smell. There was no evidence produced by the Government that Dunbar or anyone else had been or would be able to smell marijuana under these circumstances. Indeed, Agent Logan, called to testify for this purpose, was unable to recall whether he had ever been involved in a situation involving comparable circumstances,* and thus could not testify whether he would be able to smell marijuana bricks wrapped as these were.

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*Judge Pierce's opinion refers only to the paper and one layer of plastic, and makes no reference to the presence of talcum powder. However, the record is clear, from testimony of Government witnesses, that the other circumstances were present.

A great deal of discussion related to the Meinecke case, the case referred to in the affidavit as having occurred under similar circumstances and resulting in a seizure at Penn Station. However, it was shown that, in Meinecke, the disproportionate weight and the presence of talcum were factors related by Dunbar, that it was unclear how the packages were wrapped, and that McCravy also smelled the odor before getting the warrant.

Finally, Judge Pierce refused to permit the definitive test for establishing Dunbar's ability, or the ability of anyone else, to smell the marijuana as it was wrapped in this case. He refused to permit an experiment to be made involving marijuana similarly wrapped to ascertain whether an odor was emitted.

Based on the deficiencies in the affidavit and the information disclosed at the hearing, it is clear that, as defense counsel argued below, Dunbar's other successes in disclosing the presence of marijuana had been based, as in Meinecke, on a combination of factors: weight and the observable presence of talcum powder, as well as smell. It is also clear that the allegation that Dunbar's information had been valid in other cases involving "similar circumstances" was not confirmed, for neither McCravy nor Sweikert was able to relate such an instance.

Thus, the affidavit failed to establish a basis for the informer's conclusions, and the hearing showed that, in fact, there was no justification for considering the allegations to

be valid. Accordingly, it was error to deny the motion to suppress the evidence seized.

CONCLUSION

For the above-stated reasons, the judgment below must be reversed, the evidence suppressed, and the indictment dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

April 18, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York and to John Jessup, Esq., counsel for appellant Fanelli.

Philip Robert Bress